

1 CHRISTINA L. GOEBELSMANN (SBN 273379)  
2 Assistant United States Trustee  
3 TREVOR R. FEHR (SBN 316699)  
4 Trial Attorney  
5 United States Department of Justice  
6 Office of the United States Trustee  
7 450 Golden Gate Avenue, Room 05-0153  
8 San Francisco, California 94102  
9 Phone: (415) 705-3333  
10 Facsimile: (415) 705-3379  
11 Email: Trevor.fehr@usdoj.gov

12 Attorneys for TRACY HOPE DAVIS  
13 United States Trustee for Region 17

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

In re ) Case No. 23-40997 CN  
Nutrition 53, Inc., ) Chapter 11  
Debtor. ) Date: October 18, 2024  
 ) Time: 3:00 p.m.  
 ) Place: 1300 Clay Street, Ctrm 215  
 ) Oakland, CA  
 ) [In Person or via Zoom]

---

**OBJECTION AND RESERVATION OF RIGHTS OF THE UNITED STATES TRUSTEE  
TO THE APPLICATION TO EMPLOY MILES ARCHER WOODLIEF  
AS ATTORNEY FOR THE DEBTOR IN POSSESSION (ECF NO. 91)**

Tracy Hope Davis, United States Trustee for Region 17 (the “U.S. Trustee”), by and through her undersigned counsel, hereby files this objection and reservation of rights (“Objection”) with respect to the amended application to employ Miles Archer Woodlief (“Proposed Counsel”) as counsel for debtor Nutrition 53, Inc. (the “Debtor”) (ECF No. 91) (the “Amended Employment Application”). In support of her Objection, the U.S. Trustee respectfully represents as follows:

## I. INTRODUCTION

1. The Court should deny the Employment Application because it does not satisfy the requirements of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. The Amended Employment Application fails to adequately address the disinterestedness and disclosure standards of 11 U.S.C. § 327 and Federal Rule of Bankruptcy Procedure 2014. Proposed Counsel's representation of the Debtor's affiliated individuals, William and Julie Romanowski, in their bankruptcy case may give rise to an actual conflict that disqualifies Proposed Counsel from representing the Debtor in this case.

2. The U.S. Trustee reserves all her rights with respect to this matter, including, but not limited to her right to take any appropriate action under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the U.S. Bankruptcy Court.

## II. STATEMENT OF FACTS

## A. General Case Background

3. On August 11, 2023, (the “Petition Date”), the Debtor commenced this voluntary case under Chapter 11 of the United States Bankruptcy Code. *See* ECF No. 1.<sup>1</sup> The Debtor filed this bankruptcy case because of “[a]ggressive unjustified and unapproved IRS actions against DIP on a 3<sup>rd</sup> party’s tax debt[.]” *See* ECF No. 33.

4. The first meeting of creditors under 11 U.S.C. § 341(a) was held on September 25, 2023, continued to October 16, 2023, November 6, 2023, November 27, 2023, December 13,

<sup>1</sup> The U.S. Trustee requests that the Court take judicial notice of the Debtor's Petition, Schedules, Statement of Financial Affairs, and other documents filed therewith, and any amendments thereto which are in the Court's file in this case pursuant to Fed. R. Evid. 201, as made applicable by Fed. R. Bankr. P. 9017 to the extent that this Objection contains factual assertions predicated upon statements made by Debtor, its agents, attorneys, professionals, or employees, the U.S. Trustee submits that such factual assertions are supported by admissible evidence in the form of admissions of a party opponent under Fed. R. Bankr. P. 9017 and Fed. R. Evid. 801(d)(2).

1 2023, January 10, 2024, January 24, 2024, and concluded on February 14, 2024. *See Docket*  
2 *generally.*

3 **B. The Employment Applications**

4  
5 7. On August 22, 2023, the Debtor filed an initial application to employ Proposed  
6 Counsel (“First Employment Application”) (ECF No. 24). The same day, the Bankruptcy Court  
7 entered a docket text order stating “[t]he Application is not granted as the Application is  
8 premature.” *See Docket Text Entry at August 22, 2023.*

9  
10 8. No subsequent order was entered approving the First Employment Application.

11  
12 9. After a Status Conference held on September 20, 2024, the Bankruptcy Court  
13 entered a docket text order stating, “[b]y 9/23/2024, Mr. Woodlief shall file and serve his  
14 Amended Employment Application. By 10/7/2024, U.S. Trustee shall file and serve an  
15 opposition. By 10/15/2024, Mr. Woodlief shall file his response.” *See Docket Text Entry at*  
16 *September 20, 2024.*

17  
18 10. On September 23, 2024, the Debtor filed the Amended Employment Application.  
19 *See ECF No. 91.* The Amended Employment Application is supported by a Declaration of  
20 Proposed Counsel and an Attorney Statement under Federal Rule of Bankruptcy Procedure  
21 2016(b). *Id.* The Amended Employment Application states that Proposed Counsel “shall be  
22 compensated for his services actually rendered on an hourly basis at a reduced billing rate of  
23 \$450.00[.]” *Id.* at 5.

24  
25 11. As to disinterestedness and disclosure of connections, the Amended Employment  
Application states in paragraphs 7 and 8:

26  
27 7. To the best of Debtor’s knowledge, Woodlief has no connection with our  
28 creditors or any other parties in interest or its respective attorneys, except that  
Woodlief represents Debtor in these proceedings and one of its equity security

holders in a separate bankruptcy case, all as stated in the affidavit of Miles Archer Woodlief, attached to this application.

8. Woodlief does not represent any interests adverse to Debtor or to its estate and is a "disinterested person" as that term is defined in Code section 101(14). Moreover, the employment of Woodlief is necessary and would be in the best interests of Debtor and its estate.

*See ECF No. 91, at 6.*

12. Proposed Counsel's declaration asserts in Paragraphs 3 and 4:

3. *NB:* I represent one of the Debtor's directors and equity holders and his wife, William and Julie Romanowski, in their individual Chapter 11 case, but in no other capacity. Those individuals will not have a claim in this case and neither is an officer of the Debtor. They are co-defendants in a claim brought by the IRS and the joint representation will allow for efficiencies that will lead to a stronger defense beneficial to this estate. Based on the underlying facts, I do not believe this representation presents a conflict of interest for either estate.

4. Therefore, as far as I have been able to ascertain after due inquiry, I represent no interests adverse to Debtor and its estate.

*See* ECF No. 91, at 8.

13. However, the Debtor scheduled Bill Romanowski as an unsecured creditor owed \$463,123, and Mr. Romanowski filed a claim for \$463,123.44 in the Debtor's case on December 26, 2023. *See* ECF No. 6; Claim No. 15-1. The claim states that the amount is related to loans Mr. Romanowski made to the Debtor. *Id.* As of the filing of this Objection, that claim has not been withdrawn. *Id.*

14. On September 5, 2024, Mr. Romanowski and his spouse (the “Romanowskis”) filed an application to employ Proposed Counsel in their personal bankruptcy case (the “Romanowski Employment Application”). *See In re William and Julie Romanowski*, Case No. 24-40726 (Bankr. N.D. Cal.), ECF No. 84. The Romanowski Employment Application makes similar arguments to the Amended Employment Application, stating that Proposed Counsel is

1 representing the Debtor; that the Romanowskis are co-defendants in a claim brought by the IRS,  
2 but have no claim in the Debtor's case; and that joint representation will allow for efficiencies  
3 that will lead to a stronger defense. *Id.* at 8.  
4

5 15. On September 11, 2024, the U.S. Trustee filed an Objection and Reservation of  
6 Rights to the Romanowski Employment Application. *See In re William and Julie Romanowski*,  
7 Case No. 24-40726 (Bankr. N.D. Cal.), ECF No. 86. That objection similarly argues that the  
8 Romanowski Employment Application fails to adequately address the disinterestedness and  
9 disclosure standards of 11 U.S.C. § 327 and Federal Rule of Bankruptcy Procedure 2014 in the  
10 face of potential, if not actual, conflicts of interest. *Id.*  
11

### 12 III. **OBJECTION**

#### 13 A. **Legal Standards Under Section 327 and Rule 2014.**

14 16. Section 327(a) requires that professional persons seeking authorization to  
15 represent the bankruptcy estate be disinterested and prohibits such professionals from  
16 representing any interest adverse to the estate. *See* 11 U.S.C. § 327(a).  
17

18 17. Under Federal Rule of Bankruptcy Procedure 2014(a), an application to employ  
19 an estate professional must include specific disclosures, including any proposed arrangement for  
20 compensation and all connections with any party of interest. Fed R. Bankr. P. 2014(a). The  
21 application must also include a statement verified by the professional disclosing such connections.  
22 *Id.*

23 18. The Ninth Circuit applies the disclosure requirements of Rule 2014 "strictly."  
24 *Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th  
25 Cir. 1995). "[T]he disclosure rules are not discretionary." *Mehdipour v. Marcus & Millichap (In*  
26 *re Mehdipour)*, 202 B.R. 474, 480 (B.A.P. 9th Cir. 1996); *see also In re Tevis*, 347 B.R. 679,  
27 693–93 (B.A.P. 9th Cir. 2006). An attorney for a chapter 11 debtor has a mandatory, affirmative,  
28

1 and independent duty to make full and complete disclosure. 11 U.S.C §§ 327(a), 329; Fed. R.  
2 Bankr. P. 2014; *In re Park-Helena Corp.*, 63 F.3d at 881; *In re Plaza Hotel Corp.*, 111 B.R. 882,  
3 883 (Bankr. E.D. Cal. 1990) *aff'd* 123 B.R. 466, 1990 WL 212563 (B.A.P. 9th Cir. 1990)  
4 (unpublished opinion).

5  
6 19. These disclosure requirements assist the Court in ensuring an attorney has no  
7 conflicts of interest. *See In re Sundance Self Storage-El Dorado LP.*, 482 B.R. 613, 626, 631  
8 (Bankr. E.D. Cal. 2012) (“A potential conflict also provides sufficient grounds for a court to deny  
9 a professional’s employment.”).

10  
11 20. Under Section 327(a), a professional representing a debtor in possession may not  
12 hold or represent “an interest adverse to the estate” and must be a “disinterested person.” *See* 11  
13 U.S.C. § 327(a). In turn, a “disinterested person” is defined in the Bankruptcy Code to include  
14 one who “does not have an interest materially adverse to the interest of the estate or of any class  
15 of creditors or equity security holders, by reason of any direct or indirect relationship to,  
16 connection with, or interest in, the debtor, or for any other reason.” *See* 11 U.S.C. § 101(14)(C).

17  
18 21. Section 327(c) provides that a person is not disqualified “solely” because of  
19 employment by or representation of a creditor; however, following an objection by a creditor or  
20 the U.S. Trustee, the finding of an actual conflict mandates disqualification of the professional.  
21 *See* 11 U.S.C. § 327(c). “An actual conflict involves the representation of two presently  
22 competing and adverse interests, while a potential conflict occurs where the competition may  
23 become active if certain contingencies arise.” *See Maiman v. Spizz (In re Ampal-Am. Isr. Corp.)*,  
24 554 B.R. 604, 619 (S.D.N.Y. 2016) (citing *In re Granite Partners, L.P.*, 219 B.R. 22, 33 (Bankr.  
25 S.D.N.Y. 1998) and *In re Diva Jewelry Design, Inc.*, 367 B.R. 463, 472 (Bankr. S.D.N.Y. 2007)  
26 (defining actual conflict of interest as “an active competition between two interests, in which one  
27 interest can only be served at the expense of the other”)). For example, if the creditor is also an  
28

1 insider, the disqualification would not arise solely because of the representation of a creditor. *See*  
2 *In re Git-N-Go, Inc.*, 321 B.R. 54, 61 (Bankr. N.D. Okla. 2004).

3 22. Both potential conflicts and actual conflicts are grounds for a Bankruptcy Court to  
4 deny a professional's employment. *See In re Marvel Entm't Group*, 140 F.3d 463, 477 (3d Cir.  
5 1998) ("Section 327(a) presents a per se bar to the appointment of a law firm with an actual  
6 conflict, and gives the district court wide discretion in deciding whether to approve the  
7 appointment of a law firm with a potential conflict.").

8 23. Obtaining a conflict waiver does not override the requirements of Section 327(a).  
9 *See In re Project Orange Assocs., LLC*, 431 BR 363, 374 (Bankr. S.D.N.Y. 2010). The  
10 disinterestedness requirement of Section 327(a) does not allow for the waiver of conflicts of  
11 interest. *See United States Trustee v. Price Waterhouse*, 19 F.3d 138, 141 (3d Cir. 1994); *In re*  
12 *Granite Partners*, 219 B.R. at 34.

13 15 **B. The Employment Application Fails to Meet the Requirements of the Bankruptcy  
16 Code and the Federal Rules of Bankruptcy Procedure.**

17 24. The objections herein are similar to the objections raised in the U.S. Trustee's  
18 objection in the Romanowski case. *See In re William and Julie Romanowski*, Case No. 24-  
19 40726 (Bankr. N.D. Cal.), ECF No. 86. Further, in addition to the conflict of interest in  
20 representing both Debtor and the Romanowskis in their bankruptcy cases, Proposed Counsel's  
21 time spent representing both estates may indicate a conflict of interest in representing either entity.

22 25. Although the Bankruptcy Court has wide discretion in deciding whether to  
23 approve the employment of counsel, the Debtor and Proposed Counsel have failed to demonstrate  
24 that approval of the Amended Employment Application would be consistent with the Bankruptcy  
25 Code and the Federal Rules of Bankruptcy Procedure. *See In re Marvel Entm't Group*, 140 F.3d  
26 463, 477 (3d Cir. 1998).

1       26. The Debtor and Proposed Counsel have failed to address how the Firm's  
2 employment can be approved under Sections 327(a) and (c). Counsel in a Chapter 11 case must  
3 be able to effectively negotiate and potentially litigate matters on behalf of the Debtor. *See In re*  
4 *Project Orange Assoc., LLC*, 431 B.R. at 375 (citing *In re American Printers & Lithographers*,  
5 *Inc.*, 148 B.R. 862, 865-66 (Bankr. N.D. Ill. 1992)). However, the record in this case reflects an  
6 evident potential, if not actual, conflict of interest that could impair Proposed Counsel's ability to  
7 effectively represent the Debtor in its case—Proposed Counsel's representation of the  
8 Romanowskis in their personal bankruptcy case. *See* ECF No. 84, at 6 & 8. The Amended  
9 Employment Application does not provide any legal argument as to how representation of  
10 individuals that are co-defendants with the Debtor in a matter central to the Debtor's bankruptcy  
11 case is not a potential or actual conflict under Section 327. Further, Proposed Counsel's  
12 declaration inaccurately states that the Romanowskis do not have a claim in the Debtor's  
13 bankruptcy case. *See* ECF 91, at 8. The Debtor's Schedule E/F lists Mr. Romanowski an  
14 unsecured creditor and Mr. Romanowski filed a claim for \$463,123.44 which, as of the date of  
15 filing this objection, has not been withdrawn. *See* ECF No. 6 and Claim No. 15-1.

16       27. Representing two separate estates that are co-defendants in the litigation that  
17 instigated the filing of the Debtor's bankruptcy case provides a likely, if not active, competition  
18 between interests. As Mr. Romanowski is also an unsecured creditor in the Debtor's case (despite  
19 Proposed Counsel's representation to the contrary), concurrently representing the two bankruptcy  
20 estates with interconnected litigation and claims may impede Proposed Counsel's ability to  
21 effectively and impartially negotiate or litigate matters. Further, Proposed Counsel's  
22 representation of both estates to date without an order approving his employment in either case  
23 may create a conflict of interest that disqualifies him from representing either entity in their  
24 bankruptcy cases.

28. The only argument advanced in the Amended Employment Application that the employment is that “joint representation will allow for efficiencies that will lead to a stronger defense beneficial to this estate.” ECF No. 91, at 8. This argument does not present any legal basis or facts showing that a potential, or actual, conflict of interest does not arise from the concurrent representation. To the contrary, Proposed Counsel’s representation of both estates establishes that he has interests on both sides of the co-defendant relationship. The argument that this connection will provide a “stronger defense” underscores the existence of an apparent conflict of interest, regardless of which estate he is representing.

29. The disinterestedness requirement of Section 327 does not allow for the waiver of a conflict of interest. *See United States Trustee v. Price Waterhouse*, 19 F.3d 138, 141 (3d Cir. 1994); *In re Granite Partners*, 219 B.R. at 34. Because Proposed Counsel has failed to present legal argument or facts demonstrating that a conflict does not exist, the Amended Employment Application should be denied.

#### IV. CONCLUSION

30. Based on the foregoing, the U.S. Trustee respectfully requests that the Court (i) deny the Employment Application and (ii) grant such other relief as the Court deems appropriate and just.

31. The U.S. Trustee reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this objection, file an appropriate motion and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

11

11

1 Dated: October 4, 2024

Respectfully submitted,

2 TRACY HOPE DAVIS  
3 UNITED STATES TRUSTEE, REGION 17

4 By: /s/ Trevor R. Fehr  
5 Trevor R. Fehr  
6 Trial Attorney for United States Trustee